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Recent Case: Antitrust - Parens Patriae - State Recovery of Money Damages [*Hawaii v. Standard Oil Co.*, 431 F.2d 1282 (9th Cir. 1970), *cert. granted*, 401 U.S. 936 (1971)]

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Recent Cases

ANTITRUST — PARENS PATRIAE — STATE RECOVERY OF MONEY DAMAGES

Hawaii v. Standard Oil Co.,
431 F.2d 1282 (9th Cir. 1970), *cert. granted*,
401 U.S. 936 (1971).

The Court of Appeals for the Ninth Circuit has recently held, in *Hawaii v. Standard Oil Co.*,[1] that a state may not maintain an antitrust treble damage action under section 4 of the Clayton Act[2] for injuries to its general economy. The State of Hawaii, suing under a theory of *parens patriae*, charged that the defendants[3] had conspired to fix the price of gasoline and asphalt in Hawaii,[4] thus injuring its general economy.[5] Hawaii sought recovery on two counts: (1) that the state's proprietary capacity had been injured,[6] and (2) that as *parens patriae* of its citizens, Hawaii was entitled to treble damages under section 4 of the Clayton Act and to injunctive relief. Standard Oil's motion to have the second count dismissed was denied by the district court,[7] but the court of appeals reversed, stating: "We

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[1] 431 F.2d 1282 (9th Cir. 1970), *cert. granted*, 401 U.S. 936 (1971).

[2] 15 U.S.C. § 15 (1964). Section 4 provides in part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

[3] The defendants were Standard Oil Company of California, Union Oil Company of California, Shell Oil Company, and Chevron Asphalt Company.

[4] Price fixing is a restraint of trade in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1964). *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[5] Hawaii alleged the following injuries in its complaint:

> (a) revenues of its citizens have been wrongfully extracted from [the economy of] the State of Hawaii; (b) taxes affecting the citizens and commercial entities have been increased to [offset] such losses of revenues and income; (c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed; (d) the full and complete utilization of the natural wealth of the State has been prevented; (e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market; (f) measures taken by the State to promote the general progress and welfare of its people have been frustrated; (g) the Hawaii economy has been held in a state of arrested development. 431 F.2d at 1283 n.2 (bracketed language included by court).

[6] The court was not concerned with this count on appeal. *See* Georgia v. Evans, 316 U.S. 159 (1942).

[7] Hawaii v. Standard Oil Co., 301 F. Supp. 982, 988 (D. Hawaii 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *cert. granted*, 401 U.S. 936 (1971).

hold only that damages for injury done to the general economy of a state are not recoverable by the state under § 4 of the Clayton Act."[8]

States have been using the *parens patriae* theory for the past 50 years to obtain injunctive relief when their quasi-sovereign interests have been endangered.[9] But although historically *parens patriae* had been used exclusively to obtain equitable relief,[10] in 1945, in *Georgia v. Pennsylvania R.R.*,[11] the Supreme Court indicated that a state could use a *parens patriae* theory to recover damages resulting from an antitrust violation. In that case, Georgia brought a *parens patriae* action against 20 railroads, charging them with freight rate discrimination. The Supreme Court stated that not only did Georgia's complaint state a cause of action for injury to her proprietary interests, but also that "[t]here is no apparent reason why [*parens patriae*] suits should be excluded from the purview of the anti-trust acts."[12] The Court found, however, that because the freight rates had been approved by the Interstate Commerce Commission, they were "legal,"[13] and thus Georgia could not collect damages.[14]

The district court in the *Hawaii* case strongly relied on the *Georgia* decision for the proposition that a state can properly maintain a treble damage suit under section 4 in its *parens patriae* capacity.[15] The court of appeals, however, distinguished *Georgia* on the grounds that *Georgia* involved section 16 of the Clayton Act.[16] The court pointed out that the injunctive relief envisaged by section 16 is different than the monetary relief provided by section 4. Furthermore, the court emphasized that section 16 is much broader than section 4. Under section 16, any person is "entitled to sue for and

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[8] 431 F.2d at 1284.

[9] *See* Missouri v. Illinois, 180 U.S. 208, 241 (1901).

[10] *See, e.g.*, Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (equitable relief obtained to stop pollution from a smelting plant); Kansas v. Colorado, 206 U.S. 46 (1907) (equitable relief appropriate to protect a state's water rights).

[11] 324 U.S. 439 (1945).

[12] *Id.* at 447.

[13] *See* Keogh v. Chicago & N.W.R.R., 260 U.S. 156 (1922).

[14] The case was remanded to a special master to determine what relief should be granted. At that proceeding, Georgia failed to show that an injury to its economy had occurred and the case was dismissed. Georgia v. Pennsylvania R.R., 340 U.S. 889 (1950).

[15] 301 F. Supp. at 987. This reading of the *Georgia* case has been criticized. *See* Malina & Blechman, *Parens Patriae suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193 (1970). The authors of the above article noted that "[w]ith no [*parens patriae*] treble damage claim before the Court, the *Georgia* opinion can scarcely stand as approving authority for the novel assertion presented by Hawaii and accepted by Judge Pence." *Id.* at 220.

[16] 15 U.S.C. § 26 (1964).

have injunctive relief . . . [when] threatened [with] loss or damage by a violation of the antitrust laws . . . ."[17] On the other hand, under section 4, a person must be *injured* in his *business or property* before he can recover treble damages.

After distinguishing the *Georgia* case, the court of appeals decided that because of Hawaii's inability to specify a "precise theory or measure" of damages,[18] it was doubtful whether there really was an independent injury[19] to its general economy. The court felt that the general economy of a state is an abstraction which "exists only as a reflection of the business or property values it represents."[20] For the sake of argument, however, the court assumed that the general economy of a state could suffer antitrust injuries that were independent of any injuries suffered by private individuals or by the state itself in its proprietary capacity. The court then held that for two closely related reasons Hawaii could not use section 4 of the Clayton Act to recover money damages for injuries to the state's economy. The court first pointed out that the words "business or property" in section 4 cannot include "all manner of damage felt by a community."[21] The court was unwilling to expand the traditional common law usage of "business or property" in such a manner that the "general economy of a region [could] be regarded as property in possession of the residents individually or publicly."[22] The court's second reason for denying recovery was that any injury to the general economy would have been too indirect and consequential to be recoverable under the Clayton Act.[23]

The difficulty any state will have in proving and quantifying legal damage to its general economy as a direct result of an antitrust violation is graphically shown by Hawaii's failure to even attempt to estimate quantitative damages to its general economy.[24] Before a state could recover damages for an injury to its general econ-

[17] *Id.*

[18] Hawaii stated in its complaint: "Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when such amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein." 431 F.2d at 1283.

[19] To be able to bring a *parens patriae* action, "the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." Oklahoma v. Cook, 304 U.S. 387, 396 (1938) (state could not enforce claims of state bank's creditors and depositors). *See also* Pennsylvania v. West Virginia, 262 U.S. 553, 598 (1923).

[20] 431 F.2d at 1285.

[21] *Id.*

[22] *Id.*

[23] *See* Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955).

[24] *See* note 18 *supra.*

omy resulting from price fixing, it would have to show "more than a shift of resources from one sector of its economy to another sector of the same economy."[25] Even though economists can show a theoretical loss of tax revenues resulting from price fixing,[26] this does not necessarily establish a harm to the state's general economy. For example, lower gasoline sales tax revenues, resulting from a decrease in consumption of overpriced gas, could be compensated for by higher corporate income tax revenues. Also, even wrongfully procured capital does not necessarily harm the state if it remains within the state's general economy.[27] Possibly by showing that companies were deterred from locating in Hawaii because of the higher price of gasoline and that this in turn caused reduced wages and a slower economic growth, Hawaii could establish a basis for computing money damages resulting from an injury to its economy.[28] But even though price fixing may raise the cost of particular goods in the state and thus deter potential investors, it is not a matter of inexorable economic theory that the state's economic growth will consequently be retarded. "To the contrary, inflation is often accompanied by increased economic activity."[29]

The Supreme Court has agreed to hear the *Hawaii*[30] case, and hopefully the issue of *parens patriae* treble damage actions under section 4 will soon be resolved. If the Court decides that such an action can be brought, the states may become an important element in the enforcement of the antitrust laws.[31] Several commentators have argued strongly, however, that the intrusion of *parens patriae* into the antitrust area is a perversion of the concept.[32] They believe that *parens patriae* actions should be eliminated from the statutory

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[25] Note, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROBS. 411, 420 (1970).

[26] *Id.* at 415-17.

[27] *Id.* at 420.

[28] *See* Malina & Blechman, *supra* note 15, at 221.

[29] *Id.*

[30] Hawaii v. Standard Oil Co., 401 U.S. 936 (1971).

[31] State *parens patriae* treble damage actions currently pending against the Automobile Manufacturers Association will certainly benefit from such a decision. *See, e.g.*, Automobile Mfrs. Ass'n, Civil No. 69 C 5037 (S.D.N.Y., filed Nov. 17, 1969) (New York harmed by auto companies' conspiracy not to equip motor vehicles with air pollution control devices); Illinois v. Automobile Mfrs. Ass'n, Inc., Civil No. 69 C 2194 (N.D. Ill., filed Oct. 25, 1969) (Illinois harmed by auto companies' conspiracy not to equip motor vehicles with air pollution control devices).

[32] *See* Malina & Blechman, *supra* note 15, at 223. *See also*, Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 12-15 (1971).